Action Automotive, Inc. and Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC. Case 7-CA-20341

June 24, 1982

DECISION AND ORDER

By Members Jenkins, Zimmerman, and Hunter

Upon a charge filed on February 22, 1982, by Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union, and duly served on Action Automotive, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on March 4, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 11, 1982, in Unit A, as described below, and on January 26, 1982, in Unit B, as described below, following a Board election in Case 7-RC-16322, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the units found appropriate; and that, commencing on or about February 8, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 12, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 19, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 30, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show

Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits the Union's request and its refusal to bargain, but denies that the Union was selected by a majority of the employees in either bargaining unit or that the Union is the exclusive collective-bargaining representative of the employees in either unit described below.

Review of the record herein, including the record in Case 7-RC-16322, reveals that on March 31, 1981, the Union filed a petition seeking to represent certain employees of Respondent. The parties executed a Stipulation for Certification Upon Consent Election which was approved on April 28, 1981.

On May 29, 1981, a secret-ballot election was conducted among Respondent's employees in the following appropriate units:

UNIT A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

UNIT B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

In Unit A, the tally was 20 for, and 18 against, the Union and there was 1 challenged ballot.² In

¹ Official notice is taken of the record in the representation proceeding, Case 7-RC-16322, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F. Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

² The challenge to one of the ballots in Unit B was based on a contention that the employee was mistakenly included on the Unit B eligibility

Continued

Unit B, the tally was four for, and three against, the Union, and there were five challenged ballots. Thereafter, a hearing on the challenged ballots was held and on August 12, 1981, the Hearing Officer issued his report which recommended that, in Unit A, the challenge to the ballot be sustained and, in Unit B, that the challenges to three ballots be overruled, the challenge to one ballot be sustained, and, as to the final challenged ballot, the employee was not eligible to vote in Unit B, but his ballot could be transferred to Unit A where that employee is eligible to vote. Respondent and the Union filed exceptions to the report. On January 11, 1982, the Board issued a Decision, Direction, and Certification of Representative³ wherein it adopted the Hearing Officer's recommendations⁴ but found it unnecessary to decide whether the ballot cast in Unit B could be transferred to Unit A since it would no longer be determinative in Unit A, the only other challenge in that unit having been sustained. Thus, on January 11, 1982, the Union was certified as the exclusive representative of all the employees described in Unit A, and on January 26, 1982, after the Regional Director for Region 7, as directed by the Board, opened and counted the overruled challenged ballots in Unit B, the Union was certified as the exclusive representative for all employees described in Unit B.

In support of its "Motion in Opposition to the General Counsel's Motion for Summary Judgment," Respondent resubmitted its exceptions to the Hearing Officer's report and recommendations in Case 7-RC-16322.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁵

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the

list, that the employee is eligible to vote in Unit A, and therefore the ballot should be transferred to Unit A. Accordingly, had the ballot from Unit B been transferred to Unit A, the one challenged ballot in Unit A could have been determinative.

decision made in the representaion proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a corporation organized and existing by virtue of the laws of the State of Michigan, with its principal place of business located in Flint, Michigan, has been engaged in the retail sale of automotive parts and accessories and related products. During the year ending December 31, 1981, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, had gross revenues in excess of \$500,000, and had delivered to its Michigan places of business goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its places of business in Michigan directly from points located outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The units

The following employees of Respondent constitute units appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

UNIT A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S.

³ Not included in bound volumes of Board Decisions.

⁴ In addition to the Hearing Officer's finding that Diane Sabo, the wife of the president and an owner of the Employer, did not share a community of interest with employees in Unit B, Members Jenkins and Zimmerman found that the evidence also established that she enjoyed special privileges. Member Hunter would have sustained the challenge to Sabo's ballot solely on the fact that she enjoyed special privileges.

See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

UNIT B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

2. The certification

On May 29, 1981, a majority of the employees of Respondent in said units, in a secret-ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in Unit A on January 11, 1982, and in Unit B on January 26, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about January 26, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described units.

Commencing on or about February 8, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said units.

Accordingly, we find that Respondent has, since February 8, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate units, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its oper-

ations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate units and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate units will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate units. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

- 1. Action Automotive, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The following employees constitute units appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

UNIT A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical

employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

UNIT B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

- 4. Since January 11, 1982, in Unit A and January 26, 1982, in Unit B, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
- 5. By refusing on or about February 8, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate units, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
- 6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
- 7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Action Automotive, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate units:

UNIT A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy.,

Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

UNIT B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
- (a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate units with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.
- (b) Post at its nine stores as set out above copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining units described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining units described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding

is reached, embody such understanding in a signed agreement. The bargaining units are:

UNIT A

All store and warehouse employees employed by the Employer at its nine stores (G-4273 Corunna Rd., Flint, MI; 3029 S. Dort Hwy., Burton, MI; 3097 N. Genesee Rd., Flint, MI; G-2499 Flushing Rd., Flint, MI; 1275 S. Center Rd., Burton, MI; G-5016 Clio Rd., Flint, MI; 302 S. Leroy, Fenton, MI; 514 W. Atherton, Flint, MI; G-4232 S. Saginaw St., Burton, MI); but excluding all office clerical employees, store managers, assistant store managers, guards and all other supervisors as defined in the Act.

UNIT B

All office clerical employees employed by the Employer at its G-4273 Corunna Road, Flint, Michigan, facility; but excluding all store and warehouse employees, store managers, assistant store managers, guards, supervisors as defined in the Act and all other employees.

ACTION AUTOMOTIVE, INC.